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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WALTER DUDZINSKY, Defendant and Appellant.	E069417 (Super.Ct.No. FVI1501345) OPINION

APPEAL from the Superior Court of San Bernardino County. Debra Harris, Judge. Conditionally reversed with directions.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Robin Urbanski, Melissa Mandel, Tami Hennick, Meredith S. White, and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Michael Walter Dudzinsky of using a knife to commit assault with a deadly weapon. (Pen. Code,[1] § 245, subd. (a)(1).) The trial court found true allegations that he had two prior convictions that qualified both as serious prior felonies (§ 667, subd. (a)(1)) and as prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).[2] He received a sentence of 25 years to life on the assault conviction, plus two consecutive five-year terms for the prior conviction enhancements.

In this appeal, Dudzinsky argues that the trial court erred by (1) instructing the jury that the term "deadly weapon" includes an "inherently deadly or dangerous" object, instrument, or weapon, even though under California law a knife is not inherently deadly or dangerous; (2) giving an incorrect special instruction regarding evidence of mental capacity in relation to his claim of self-defense; and (3) excluding expert testimony "as to how his mental capacity affected his ability to perceive events," proffered in support of his claim of self-defense. He further argues that he is entitled to reversal because of cumulative error.

In addition to Dudzinsky's challenges to the judgment, he requests the matter be remanded for the trial court to consider whether he is entitled to relief under certain recently enacted changes to the law. Specifically, he argues that the trial court should be directed to consider on remand (1) whether he qualifies for mental health diversion under

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[1] Further undesignated statutory references are to the Penal Code.

[2] The trial court found not true allegations regarding a third prior conviction.

the newly enacted section 1001.36, and (2) whether one or both of the prior conviction enhancements should be stricken in light of recent amendments to sections 667 and 1385.

We find no prejudicial error by the trial court. We conditionally reverse the judgment and remand the matter with directions to consider whether Dudzinsky qualifies for diversion under section 1001.36, and to consider whether one or both of the prior conviction enhancements should be stricken pursuant to the changes in law.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2015, Dudzinsky was transported by ambulance to the hospital after he approached paramedics in a store parking lot complaining of knee pain. As the ambulance approached the hospital, he suddenly became agitated, trying to get off the gurney and swinging his arms at one of the paramedics. But the paramedic was able to calm him down and then take him inside the hospital.

Inside the hospital, while waiting in a hallway outside the emergency room, the paramedic saw Dudzinsky start to move his hands around, dig into his pockets, and then pull out two knives. The paramedic told Dudzinsky he needed to put the knives back in his pockets. He profanely declined to do so and got off the gurney. According to the paramedic, Dudzinsky then "just started . . . moving around with his arms flinging, yelling and screaming." The paramedic and others in the hallway backed away and hospital security was called.

The hospital's security manager responded to the scene. He testified at trial that he told Dudzinsky to drop his weapons. In response, Dudzinsky turned around and moved aggressively toward the security manager, making stabbing motions with the knives and saying "Do you want some? You want some of this?" The security manager managed to knock Dudzinsky to the ground, after which several people pinned Dudzinsky down and the security manager was able to disarm him. Law enforcement arrived a short time later and Dudzinsky was arrested.

Dudzinsky testified in his own defense at trial. He stated that he was homeless in June 2015, and he approached the paramedics because he wanted to get medical attention for his knee. He had multiple knives with him because he used them for certain purposes; one knife he used to extract "precious metals" from objects, another he used for "utilities, spreading mayonnaise and slicing cheese," and another he used for "opening . . . various plastic packages."

Dudzinsky further testified that during the ride to the hospital he fell asleep, and the next thing he remembered was waking up in the hospital. When he woke up, he "had a panic attack," experiencing an "ominous feeling of danger," "confusion," and "panic." He explained that he had been assaulted and seriously injured on two previous occasions, in 2013 and 2014. The two assaults caused him to be "[m]ore paranoid and leery of people," especially people behind him or people yelling at him. He described waking up in the hospital on June 1, 2015, as like a flashback, triggering "total panic." He testified that he now understood that no one in fact was attacking him. But when he first woke up,

he believed he was in "imminent danger." He brandished the knives not to try to hurt anyone, but only to "deter anybody from coming at" him until he could get his bearings and clear his head.

The prosecution presented rebuttal evidence from the law enforcement officer who arrested Dudzinsky. The officer testified that Dudzinsky waived his *Miranda*[3] rights and spoke with him about what had happened. During their conversation, Dudzinsky made no mention of self-defense.

II. DISCUSSION

A. *Instructional Error*

Dudzinsky asserts the jury's instructions were erroneous in two ways. First, he argues that definition of the term "deadly weapon" given by the court was erroneous, given the facts of the case. Second, he contends the trial court gave an erroneous special instruction regarding evidence of mental capacity in relation to his claim of self-defense. We find no prejudicial error.

1. *Standard of Review*

"We review defendant's claims of instructional error de novo." (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

2. *Instruction Defining "Deadly Weapon"*

a. *Additional Background*

The trial court instructed the jury on the charged offense of assault with a deadly weapon using a modified version of CALCRIM No. 875. The instruction, as given, defined the term "*Deadly Weapon*" to include "any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."[4]

b. *Analysis*

The instruction given by the trial court was, in the abstract, a correct statement of the law. "As used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Some objects have been "held to be deadly weapons as a matter of law" because the "ordinary use for which they are designed establishes their character as such." (*Id.* at p. 1029.) "Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury." (*Ibid.*)

Here, however, Dudzinsky was charged specifically with using a knife to commit the charged offense, and there was no suggestion in the evidence that he used any other weapon. It is well established that a knife is not a deadly weapon as a matter of law,

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[4] CALCRIM No. 875 defines "[a] deadly weapon other than a firearm" as "any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

though it may be used as a deadly weapon. (*People v. Herd* (1963) 220 Cal.App.2d 847, 850.) "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The trial court therefore erred by presenting the jury with a definition of the term "deadly weapon" that included an "inherently deadly or dangerous" object, instrument or weapon, a category that has no application to the facts of this case.

The parties dispute the standard we should apply to determine whether the trial court's error was prejudicial. In *People v. Chun* (2009) 45 Cal.4th 1172, the Supreme Court held that an erroneous instruction on an invalid legal theory is harmless "[i]f other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary [to support the valid legal theory]." (*Id.* at p. 1205.) Applying that standard, we hold that the instructional error was harmless.[5]

First, we note that there is no possibility that Dudzinsky could have been convicted solely on the basis of an erroneous conclusion that a knife is an inherently dangerous weapon as a matter of law. The primary dispute at trial was about whether defendant acted in self-defense, which was an element that the instructions required the

[5] The correct standard for evaluating prejudice for such instructional error is an issue upon which decisions of the Courts of Appeal conflict. (Compare *People v. Aledemat* (2018) 20 Cal.App.5th 1149, review granted July 5, 2018, S248105 (*Aledemat*) with *People v. Stutelberg* (2018) 29 Cal.App.5th 314.) Our Supreme Court has granted review to resolve the issue. (*Aledemat*, *supra*, review granted July 5, 2018, S248105.) We need not resolve this dispute, as our decision is guided by *People v. Chun*, *supra*, 45 Cal.4th 1172.

prosecution to establish. No evidence was offered to demonstrate that knives generally, or Dudzinsky's knives in particular, are inherently deadly weapons.

Further, in closing arguments, the prosecutor emphasized that the "act with a deadly weapon" element of the charged offense was satisfied because Dudzinsky used his knives in a manner that is capable of causing and likely to cause death or great bodily injury: "First, act with a deadly weapon. Well, the defendant swung his knife at [the security manager]. That's the act . . . when he charged at him swinging the knives. That's the act. When you swing a knife, *that act* by its nature is going to directly and probably result in the application of force to a person. Swinging a knife, the knife connects, you're going to cause damage." (Italics added.) In other words, the prosecutor pushed the jury to consider only the legally valid theory.

The defense, too, focused the jury's attention on evidence regarding how Dudzinsky *used* his knives, not on the nature of the knives. In closing, defense counsel conceded that Dudzinsky "brandished the knives," but emphasized his testimony that "he was not trying to stab any person," and that he was only waving the knives around to "get people to back up" while "he himself was backing up as well." In context, this line of argument seems to have been primarily intended to support Dudzinksy's claim of self-defense. The defense did not expressly contest that the prosecution had established the "act with a deadly weapon" element of the charged offense, and invoked only the legally valid definition of the term "deadly weapon" in arguing that the prosecution had not proven Dudzinsky was not acting in self-defense.

As Dudzinsky emphasizes in his briefing on appeal, the Second District Court of Appeal recently addressed a case that is similar to this one in many respects. (See *Aledamat*, *supra*, 20 Cal.App.5th at p. 1149.) In *Aledamat*, the defendant was charged with assault with a deadly weapon, among other charges, after he "thrust the exposed blade of a box cutter toward a man" while verbally threatening to kill him. (*Id.* at p. 1151.) The trial court in *Aledamat* made a similar error to the one we observed here, instructing the jury that a "deadly weapon" includes an "inherently deadly" weapon, even though a box cutter is not an inherently deadly weapon as a matter of law. (*Id.* at p. 1152.) The Court of Appeal reversed, finding "no basis in the record for concluding that the jury relied on the alternative definition of 'deadly weapon' (that is, the definition looking to how a noninherently dangerous weapon was actually used)." (*Id.* at p. 1154.)

The record in *Aledamat*, however, is different from the record of this case in one important respect. There, the prosecutor "affirmatively urged the jury to rely on the legally invalid theory" by calling the box cutter "an 'inherently deadly weapon'" during his rebuttal closing argument. (*Aledamat*, *supra*, 20 Cal.App.5th at p. 1154.) Here, counsel for both the prosecution and the defense focused the jury's attention solely on the legally *valid* theory. Nothing more than pure speculation about what the jury could have done consistent with the erroneous instruction supports the notion that the jury in fact relied on the legally *invalid* theory. On these facts, we find it inappropriate to disturb the jury's verdict.

3. *Instruction on Evidence of Mental Capacity*

a. *Additional Background*

During Dudzinsky's testimony in his own defense, on several occasions he stated, or started to state before he was interrupted by objection, that he suffers from mental illness. The trial court noted that objections were sustained to those comments, but nevertheless "the jury heard it." The trial court concluded, therefore, that it was appropriate to include an additional "pinpoint" instruction on the issue of mental capacity. The instruction applied not just to the excluded comments, but to the proper uses of any other evidence that the jury might think would bear on mental capacity, such as Dudzinsky's demeanor on the witness stand.

Thus, the jury was instructed on defendant's claim of self-defense using CALCRIM No. 3470, describing the elements of a self-defense claim as follows: "1. The defendant reasonably believed that he was in imminent danger of suffering bodily injury; or was in imminent danger of being touched unlawfully. [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger." In relevant part, the instruction further explained that "[d]efendant's belief [of imminent danger] must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did

not act in lawful self-defense. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The defendant's belief that he was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true."

To this standard instruction on self-defense, over defense objection, the trial court added the following "Special Instruction": "The reasonable person standard is not modified by evidence of mental impairment as a person's mental capacity is not taken into account when determining whether he has acted as the reasonable person would have acted. *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [(*Jefferson*)]."

b. *Analysis*

Dudzinsky contends that the second clause of the special instruction given by the trial court—that "a person's mental capacity is not taken into account when determining whether he has acted as the reasonable person would have acted"—was erroneous because evidence of a defendant's mental capacity is relevant to the jury's determination of whether his belief in the necessity of self-defense was objectively reasonable. We disagree.

"'"To justify an act of self-defense for [an assault charge under section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him."' [Citation.] In other words, the defendant's belief must both subjectively exist and be objectively reasonable." (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014 (*Brady*).)

In assessing objective reasonableness, "[t]he issue is whether a 'reasonable person' in defendant's situation, seeing and knowing the same facts, would be justified in believing he was in imminent danger of bodily harm." (*Jefferson, supra,* 119 Cal.App.4th at p. 519.) A defendant's "personal history of 'trauma, abuse, mental illness, and physical limitations' is not folded into the objective prong of a self-defense claim." (*Brady, supra,* 22 Cal.App.5th at p. 1017.) Rather, the question is "whether a person of ordinary and normal mental and physical capacity would have believed he was in imminent danger of bodily injury under the known circumstances." (*Jefferson, supra,* at p. 520.)

Dudzinsky contends that the special instruction given by the trial court "was so broadly worded as to suggest to the jury that [his] mental capacity, and likewise how he actually perceived the objective circumstances, was wholly inapplicable to its consideration of self-defense." Not so. Nothing in the special instruction precluded the jury from considering Dudzinsky's mental capacity in relation to the question of whether he actually perceived a need for self-defense, or in considering what circumstances were known to him. It only emphasized that the jury should not consider any evidence of

Dudzinsky's mental capacity in relation to whether his belief in the need for self-defense, and the amount of force he used in self-defense, were reasonable. Under the case law discussed above, the instruction was a correct statement of the law, and the trial court did not err by giving it.

B. *Exclusion of Defense Evidence*

Dudzinsky contends that the trial court erred by not permitting him to introduce expert testimony "as to how his mental capacity affected his ability to perceive events." We find no error.

1. *Additional Background*

The prosecution's motions in limine included a request to exclude any evidence of Dudzinsky's "alleged mental disease(s), defect(s), disorder(s) or some other cognizable mental state evidence during the guilt phase of the trial," including with respect to Dudzinsky's anticipated claim of self-defense. Defense counsel requested that the court allow an expert to testify about Dudzinsky's mental condition at the time of the charged offense. Defense counsel represented that the expert, a psychiatrist who had interviewed Dudzinsky, would testify in support of the notion that it was "reasonable for a person such as [Dudzinsky]" to believe that he was in imminent danger under the circumstances, given his "mental health issues," including his "current diagnosis of schizophrenia," previous diagnoses of bipolar disorder and schizophrenia, and trauma from the two prior incidents where he was attacked and injured. Defense counsel further argued that the

expert would "bolster the credibility" of Dudzinsky's testimony and present Dudzinsky's history from a "more global view" and in a "more eloquent form."

The trial court denied the defense's request to allow the expert to testify.

2. *Standard of Review*

Pursuant to Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[6] Our review is for an abuse of that discretion. (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1022.) The court's discretion in this context is """broad,""" and will be upheld unless the court exercised its discretion "'in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Celis* (2006) 141 Cal.App.4th 466, 476.)

3. *Analysis*

As discussed above, testimony regarding Dudzinsky's mental condition at the time of the offense was irrelevant to the objective prong of his self-defense claim. In that inquiry, the question is "whether a person of ordinary and normal mental and physical

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[6] The trial court did not expressly invoke Evidence Code section 352 in excluding the proffered expert testimony. Nevertheless, the trial court "is not required to '"expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function under Evidence Code section 352."'" (*People v. Nunez & Satele* (2013) 57 Cal.4th 1, 31.)

capacity would have believed he was in imminent danger of bodily injury under the known circumstances." (*Jefferson, supra*, 119 Cal.App.4th at p. 520.)

Dudzinsky's mental condition at the time of the offense does have some relevance to the subjective prong of his self-defense claim, that is, whether he "honest[ly]" believed he was in imminent danger. (See *Brady, supra*, 22 Cal.App.5th at p. 1014.) Expert testimony regarding Dudzinsky's mental condition could have, at least arguably, helped the jury understand why he might have honestly perceived a threat of violence where a person with a different personal history would not have.

Nevertheless, an expert could not opine directly on what Dudzinsky's belief was at the time of the offense. Any expert testimony regarding Dudzinsky's mental condition would have been based on what Dudzinsky told the expert during a later interview and Dudzinsky's diagnosed conditions and history. It would still have been for the jury to determine whether that second-hand view had any bearing on Dudzinsky's perceptions at the time of the offense. As such, the probative value of such expert testimony was low. Also, when testifying, Dudzinsky was permitted to articulate his perceptions at the time, and thus the jury could hear all the admissible evidence about the offense he provided to the expert. The risk of confusing the issues would have been high, given the limited purposes for which the expert's opinions could properly be considered. We do not find anything arbitrary, capricious, or manifestly absurd about the trial court's decision to exclude the proffered expert testimony.

C. *Cumulative Error*

Dudzinsky argues that he is entitled to reversal because of cumulative error. We have found only a single, nonprejudicial error. (See *ante*, Section (II)(A)(2)(b).) The cumulative error doctrine does not apply.

D. *Mental Health Diversion*

Effective June 27, 2018, the Legislature passed Assembly Bill No. 1810 (2017-2018 Reg. Sess.), which added sections 1001.35 and 1001.36 to the Penal Code. (Stats. 2018, ch. 34, § 24.) These statutes permit discretionary diversion of persons with qualifying mental disorders that contributed to the commission of the charged offense. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, 789, review granted Dec. 27, 2018, S252220 (*Frahs*).) In this context, "diversion" means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication . . . ." (§ 1001.36, subd. (c).) The court may grant diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b).)

The criminal proceedings against the defendant may be diverted for up to two years while the defendant receives treatment at an approved treatment program. (§ 1001.36, subd. (c)(1)(B), (3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

Our colleagues in Division Three of the Court of Appeal, Fourth Appellate District, recently determined that the new mental health diversion statutes apply retroactively, finding that "the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.'" (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.) The People contend that *Frahs* was wrongly decided. We reject the People's contention.

"[I]n the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.'" (*People v. Superior Court (Lara)* (2018) 4 Cal. 5th 299, 308 (*Lara*) [discussing "'*Estrada* rule'" from *In re Estrada* (1965) 63 Cal.2d 740].) The People find such contrary indications of legislative intent in the limiting language of section 1001.36, subdivision (c), "'at any point in the judicial process until adjudication.'" We disagree. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed,

the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Moreover, *Lara* was decided before the Legislature passed section 1001.36, and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) If the Legislature intended for the courts to treat section 1001.36 as prospective, we would expect the Legislature to have expressed this intent unambiguously. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) It did not.

The People also assert, without elaboration, that "the legislative history of the budget bill richly supports" its position regarding the retroactivity of section 1001.36.[7] We find nothing in the legislative history, however, that is any more elucidating about the Legislature's intent regarding retroactivity than the statutory language, or that contradicts the analysis in *Frahs*.

The People further argue that, even if section 1001.36 is retroactive, the case should not be remanded for the trial court to consider mental health diversion because the record "affirmatively demonstrates" the trial court would find Dudzinsky to pose an

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[7] The People have requested that we take judicial notice of the Assembly Floor Analysis of Assembly Bill No. 1810, which includes some discussion of the new mental health diversion program. The request for judicial notice is granted.

unreasonable risk of danger to the community. The People conclude that any remand "would be futile because the trial court would not exercise its discretion" to order mental health diversion. We disagree with the People's interpretation of the record. The trial court noted several times during sentencing that Dudzinsky would pose a danger to the community if placed on probation or simply released. But the trial court never had an opportunity to consider whether it might be possible to provide Dudzinsky services at a "recommended inpatient or outpatient program of mental health treatment" that would "meet [his] specialized mental health treatment needs" without unreasonable risk of danger to the community. (§ 1001.36, subd. (c)(1)(A).) Remand is appropriate to allow the trial court to make that determination.

E. *Resentencing*

Dudzinsky contends that he is entitled to a remand so that he can be resentenced in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393). We agree.

Effective January 1, 2019, S.B. 1393 amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court in its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the versions of these statutes in effect when the trial court sentenced Dudzinsky, the court was required to impose a five-year consecutive term for "[a]ny person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)), and the court had no discretion "to strike any prior conviction of a serious

felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).)

The People concede that the changes to the law enacted by S.B. 1393 apply to judgments, like the one in this case, which were not final on January 1, 2019, when S.B. 1393 went into effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

The People argue, based on the facts underlying Dudzinsky's current conviction and prior criminal history, as well as the trial court's sentencing decisions in this case, that the trial court would not have struck the punishments for the two prior serious felony enhancements, so remand to consider the matter would be futile. Particularly since the matter is already being remanded for another reason, however, we decline to speculate about how the trial court might exercise its newly authorized discretion.

III. DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the superior court with directions to conduct a hearing to consider mental health diversion under section 1001.36.

If the trial court determines that Dudzinsky qualifies for diversion under section 1001.36, the court may grant diversion. If Dudzinsky successfully completes diversion, the trial court shall dismiss the charges.

However, if the court determines that Dudzinsky is ineligible for diversion, or Dudzinsky does not successfully complete diversion, the court shall reinstate his convictions. If the convictions are reinstated, the trial court is directed to resentence

Dudzinsky, including considering whether to exercise its newly authorized discretion under amended sections 667, subdivision (a), and 1385, subdivision (b), to dismiss the punishment for the prior serious felony convictions.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.